No. 10048

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellant,
vs.
IVAN WOMACK,
Appellee.

IVAN WOMACK,
Appellant,
vs.
CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellee.

Upon Appeal from the United States District Court
for the District of Oregon.

BRIEF OF CROSS-APPELLANT, IVAN WOMACK

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JURISDICTION

The jurisdiction to hear the cross appeal is correctly stated by the appellant. It is therefore unnecessary to repeat it.

STATUTES INVOLVED

The cross-appellant adopts the statement of appellant.

STATEMENT OF THE CASE

The case presents for decision really four questions:

(1) Whether cookhouse employees working at a cookhouse some distance from any community (Camp 2) employed by a company engaged in the business of logging are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

(2) Whether cookhouse employees working at a cookhouse at Glenwood employed by a company engaged in the business of logging are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

(3) If such employees at Camp 2 are held to be engaged in the production of goods for commerce within the meaning of the Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged "in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce?"

(4) If such employees at the Glenwood cookhouse are held to be engaged in the production of goods for

commerce within the meaning of the Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged "in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce?"

The lower court (District Court) held that the employees described in points 1 and 2 "were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938", and held that the employees as described in point 3 were not employees engaged in "any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." As to points 1, 2 and 3, the defendant has appealed. The lower court held that the employees described in point 4 were exempt under Section 13 (a) (2). The plaintiff has cross appealed on this point.

By stipulation of the parties and by an order entered by this court, the appellant and cross-appellant were permitted to consolidate their briefs.

Arguments under I and II are technically answering arguments to appellant's brief, and the argument under III is the opening brief of cross-appellant. We are combining for argument questions 1 and 2 in part I of the argument.

This case raises squarely the coverage of the Fair Labor Standards Act over the two types of cookhouses.

ADDITIONAL STATEMENT OF FACTS

We will not go into the statement of facts at any great length, because practically all the facts are agreed upon in the stipulation set out in the pretrial order. There is also a short, condensed statement of the testimony contained in the transcript. However, there are several facts which have been left out of the statement of facts submitted by the appellant.

The logs purchased from the appellant are manufactured into lumber by the purchaser mills, and in each instance at least 70% of the lumber manufactured from said logs moves in interstate commerce (Tr. 74).

The employees of the independent companies who used the cookhouse at Glenwood were under contract to furnish logs to the appellant, and in some instances, the appellant paid the actual payrolls of these "gyppo" companies (Tr. 97).

Of the 217 men who regularly used the cookhouse at Glenwood, these men were served 3 meals per day for the working days of the month. At Glenwood there was no other practical eating facility at the time when the cookhouse was operated by the appellant. In August, 1940, after the Glenwood cookhouse was closed by the company, a "hot dog" or sandwich place was opened in Glenwood at which ice cream, sandwiches and hot coffee were served, and the proprietor

had approximately 6 stools (Tr. 95 and 96). It was necessary to have the cookhouse at Glenwood operate in order for the defendant to operate (Tr. 100).

The cookhouse at Camp 2 was located approximately 17 miles southwest of Glenwood on the appellant's logging railroad. The cookhouse at Camp 2 is one large building where food is prepared for the men and the bunkhouses are on a sidehill approximately 100 to 200 feet from the cookhouse. Breakfast is served to the men and they eat at the cookhouse. Lunches are furnished them, but they can take them with them, suppers being served at the cookhouse. The only way to get from Glenwood to Camp 2 is by train or speeder, which is owned by the appellant. There is no road to Camp 2, and the trip takes about one hour and 15 minutes. At Camp 2 all the employees eat at the cookhouse, although two or three may go back and forth by speeder occasionally during the week (Tr. 99). The cookhouse at Camp 2 is the only practical facility for eating at Camp 2 (Tr. 75).

SPECIFICATIONS OF ERROR

The District Court erred in finding that the employees of the cookhouse at Glenwood were exempt under the provisions of Section 13(a)(2) of the Fair Labor Standards Act.

This specification is argued in part III of this brief.

ARGUMENT

I

Employees in a logging camp cookhouse are engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act.

We can agree with the statement of the appellant that in determining whether the Fair Labor Standards Act applies, the determination is to be based on whether *employees* are engaged in the "production of goods for commerce". The Fair Labor Standards Act is remedial law and should be liberally construed.

> *Fleming v. Hawkeye Pearl Button Co.* (C. C. A. 8th, 1940), 113 F. (2d) 52.
> *Bowie v. Gonzalez* (C. C. A. 1st, 1941), 117 F. (2d) 11, at 16.
> *Robinson v. Larue* (Tenn.), 156 S. W. (2d) 433.

The purposes of the Act have been judicially noted from a declaration of policy in Section 2(a) of the Act, and the reports of the Congressional committees proposing the legislation, *U. S. v. Darby,* 312 U. S. 100, 109, 85 L. Ed. 609, 614.

Section 2(a) of the Act sets out the legislative policy to be as follows:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

In the *Darby Case,* Justice Stone, speaking for the court, upheld the power of regulation over intrastate commerce where it would affect interstate commerce. As the court points out, Congress has the power to legislate in matters where the goods would eventually be shipped in interstate commerce or would affect interstate commerce. Justice Stone states the power of Congress and the objective of the Fair Labor Standards Act very well, when he states (312 U. S. 123):

"Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total

> effect of the competition of many small producers may be great. * * * The legislation aimed at a whole embraces all its parts."

As noted above, one the purposes of the Act, as set out in Section 2(a)(4), is that substandard conditions lead to labor disputes, which obstruct commerce "and the free flow of goods for commerce". [Note letter of union representative to Wage and Hour Director (Tr. 37).] In connection with this, we can think of no more graphic example as an answer to the question of whether the cookhouse employees are engaged in an occupation necessary for the production of goods for commerce, than to suppose for some reason a labor dispute closed down the cookhouse. There is no question but what that would immediately shut down the whole logging operation and would burden and obstruct commerce. It is common knowledge in the Northwest that the cookhouses and good food are absolutely necessary for the efficient management of a logging camp.

It is admitted in this case that approximately 70% of the appellant's manufactured goods move in interstate commerce, and there is no question that the logs manufactured by the appellant are produced for the purpose of moving in interstate commerce.

"Produced" is defined in Section 3(j) of the Act as follows:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act

> an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof, in any State.*" (Emphasis ours.)

The question then is whether the cookhouse employees are in "an occupation necessary to the production" of the logs, which admittedly move in interstate commerce.

"Necessary" in this sense has been very well defined by the court in the case of *Fleming v. Kirschbaum,* 124 F. (2d) 567. The court, in considering whether watchmen, carpenters and porters were necessary for the production of goods for commerce stated (p. 572):

> "Although the services of the watchmen, carpenters and porter are not necessary in the sense of being indispensable they are necessary in that they are both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce."

The court then cites in a footnote on page 572:

> " 'Necessary' has frequently been construed to mean 'convenient' or 'appropriate.' McCulloch v. Maryland, 17 U. S. 316, 413, 4 Wheat. 316, 413, 4 L. Ed. 579; Legal Tender Cases, 110 U. S. 421, 440, 4 S. Ct. 122, 28 L. Ed. 204; Meriwether v. Board of Directors, 8 Cir., 1908, 165 F. 317, 319; Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co., 115 Iowa 734, 87 N. E. 670, 671; Brooks v. Chicago, W. & V. Coal Co.,

234 Ill. 372, 84 N. E. 1028, 1031; Hutcheson v. Atherton, 44 N. M. 144, 99 P. (2d) 462, 467."

(This case is later discussed at length in this brief.)

In *Virginia Railway Company v. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789, the United States Supreme Court decided that back-shop employees of a railway company were covered by the Railway Labor Act. In that case the back-shop employees were employed some distance from the railroad where they worked as machinists, boilermakers, etc., in making repairs to locomotives and cars withdrawn from service. When not engaged in making these repairs, the back-shop employees performed "store order work", which was manufacturing materials such as rivets and repair parts to be placed in railroad stores for use at the Princeton shop and other points on the line.

The United States Supreme Court in that case held that the Railway Labor Act applied to the back-shop employees, and stated (p. 554 U. S.):

> "But petitioner insists that the Act as applied to its 'back shop' employees is not within the commerce power since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner's 'back shops' at Princeton, West Virginia. They are there engaged in making classified repairs, which consist of heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of

105 days for locomotives and 109 days for cars). The repair work is upon the equipment used by petitioner in its transportation service, 97% of which is interstate. At times a continuous stream of engines and cars passes through the 'back shops' for such repairs. When not engaged in repair work, the back shop employees perform 'store order work,' the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

"The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. Ed. 878, 883, 31 S. Ct. 621; cf. Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 151, 57 L. Ed. 1125, 1127, 33 S. Ct. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. See United States v. Railway Employees Dept. A. F. L. (D. C.), 290 F. 978, 981, holding participation of back shop employees in the nation-wide railroad shopmen's strike of 1922 to constitute an interference with interstate com-

merce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress.

"It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act. It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress."

We call the court's attention, particularly, to the quotation that the repair work could be turned over to independent contractors is no answer. The court, as above noted, states in effect that irrespective of whether the work could be turned over to an independent contractor, makes no difference. Certainly then, if back-shop employees of a railroad company, who are engaged in taking care of railroad repairs, which undoubtedly could have been turned over to independent contractors, were engaged in interstate commerce, there is no question that cookhouse crews, who are directly on the premises of the employer and engaged daily in keeping the employees of the employer on the job, are certainly engaged in an occupation "necessary to the production of goods for interstate commerce." It may be that the Consolidated Timber Company could arrange for an independent

contractor to come in and set up separate cookhouses to be operated independently and for profit. The answer is that the appellant has not done so, just as it has not delegated certain other functions to independent contractors, as it might possibly do.

In the case of *Philadelphia, Baltimore & Washington Railroad Co. v. Alfred Smith,* 250 U. S. 101, 63 L. Ed. 869, the United States Supreme Court held that under the Federal Employers' Liability Act a person who was employed by a railroad company to care for and keep clean a so-called camp car and who attended the beds and cooked for himself and a gang of railroad bridge carpenters quartered in the car was employed in interstate commerce, within the meaning of the Employers' Liability Act, at the time of receiving the injuries in a collision. On page 102 the court states the duties of the plaintiff as follows:

> "Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds and prepare and cook the meals for himself and other members of the gang."

The only question that was before the court was whether plaintiff at the time he was injured was engaged in interstate commerce, within the meaning of the statute. It was argued by the defendant in this case that because plaintiff was acting as a mess cook and camp cleaner in a camp car belonging to the defendant, which was not moved in interstate commerce, and because plaintiff was injured while engaged in

cooking food which was the property of himself and the carpenters, he was not at that time engaged in interstate commerce. The court disposed of that question very briefly by stating:

> "Taking it to be settled by the decision of this court in Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 152, 57 L. Ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be, in practice and in legal contemplation, a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, What was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, *no doubt with the object, and certainly with the necessary effect, of forwarding their work by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had.* The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not with-

out significance, is of little moment. *The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang, and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.''* (Emphasis ours.)

We think this case completely disposes of the Camp 2 situation. The last three sentences of the above excerpt are especially pertinent to our problem. It is certain, and it is not disputed by the appellant, that it would be impossible to run Camp 2 unless the cookhouse was located near the premises where the men worked. In fact, that is admitted by the stipulation as well as by appellant's witness (Tr. 99). As far as Camp 1 is concerned, there were no practical facilities for eating at Glenwood. As stated above, the only evidence shown on this point was that there was a small lunch counter having six or seven stools, serving only coffee and sandwiches, which all of us as practical people know would not last a logger very long. Despite the statement of appellant's witness,

that it would have been practicable to run the operation without the cookhouse at Glenwood, we are still left in the dark as to what was going to happen to the hundred men who lived and boarded at the Glenwood cookhouse. The testimony shows that there were a number of men who had their families in Portland, and that there were no adequate facilities for the men to drive back and forth to work, and we are not shown any way in which the men could live within a reasonable distance. It seems odd to counsel for cross-appellant that Mr. Crosby was so anxious to reopen the cookhouse at Glenwood.

In the case before us, it is admitted by the appellant (Witness Crosby, Tr. 99) that Camp 2 was necessary for the operation of the logging camp.

Actually, the Glenwood cookhouse comes within the same classification, both by the testimony of the Witness McSorley (Tr. 100), and by the agreed statement of facts. It is to be noticed that there were 110 employees of the appellant eating at Glenwood, and 101 were employees of the "gyppo" loggers who supplied logs to the appellant. There were only 6 employees of independent businesses, and there were only 302 meals served to "strangers". Inasmuch as the "gyppo" loggers were supplying logs to the appellant, whose goods moved in interstate commerce by the stipulation of the parties, the vast majority of the employees who eat at the cookhouse at Glenwood

were employees who were working on goods which moved in interstate commerce.

The figures in the stipulation are somewhat misleading. For instance, 302 meals which were served to "strangers" in the month would only be approximately 4 people, eating 3 meals per day for a month. In other words, the vast majority of the men who ate at the Glenwood camp were men who produced logs for commerce for the appellant and appellant's contractors.

In the case of *Fleming v. Kirschbaum,* 124 Fed. (2) 567, the Circuit Court of Appeals upheld the lower court which held that elevator operators, engineers and firemen employed by an owner who leased his building to tenants, a number of whom manufactured goods which were shipped in interstate commerce, were engaged in "the production of goods for commerce" so as to be entitled to benefit of wage and hour provisions of the Fair Labor Standards Act of 1938, notwithstanding that the engineers and firemen had no actual physical contact with such goods, where their services were so necessary to production by the owner's tenants of goods for commerce as to be indispensable to such production. In that case the Circuit Court of Appeals held that even where the employer was not engaged in interstate commerce, the fact that *the employer served people who were engaged in interstate commerce was enough to make those employees necessary for the production of goods for*

commerce. Certainly, if a fireman and engineer of a building, who merely furnish heat to another employer whose employees are engaged in interstate commerce, are covered by Section 7 of the Act, there is no question that cooks in logging camps, who are working directly for an employer who is engaged in the production of goods for interstate commerce, are covered by the Act.

This case completely refutes the statement made by counsel and the narrow interpretation to be put on the word "produced". The court holds definitely that it is not necessary to have physical contact with the goods in order to be engaged in producing the same. The court states (p. 571):

> "It is quite obvious that the defendant's engineer, firemen, elevator operators, watchmen, carpenters and porter were not engaged in the production of goods for commerce in the sense that they had actual physical contact with the goods produced. The word 'produced,' however, was used in no such restricted sense in the act. It is defined at some length in Section 3 (j), 29 U. S. C. A. Sec. 203 (j), with the obvious intention of giving it a broader meaning than the one which it has in ordinary usage."

The court then states, after quoting the statutory definition of "produce":

> "Thus, for the purposes of the act an employee is to be deemed engaged in the production of goods for commerce not only when he has direct physical contact with the goods, but also

> when he is employed in 'any process or occupation necessary to the production thereof.' "

The court then states:

> "The question before us, therefore, comes down to whether the men with whom we are here concerned were engaged in an occupation necessary to the production of goods for commerce. We think they were. All the manufacturing tenants in the defendant's building need heat and light; most need elevators to carry men and material up to their respective floors in the building and to take finished product and men down; * * *".

The court then proceeds to set out the work of the individuals involved in the case.

The court also comments on the possibility of a strike of the elevator operators, and as to the effect of that strike even on their own employer, who, himself, was not engaged in producing goods for interstate commerce, and on the tenants of the building who were so engaged. This illustration would more vividly apply in a strike or stoppage of work by cooks in the cookhouse of a logging camp where food is so essential to the carrying on of the operation.

In the case of *Fleming v. Arsenal Bldg. Corporation,* 125 Fed. (2) 278, the Circuit Court of Appeals held that similar employees, who furnished service to a building, where the tenants were engaged in the production of goods for interstate commerce, were under the Fair Labor Standards Act. The court in so

holding reversed the lower court. The court, speaking through Justice Learned Hand, very succinctly states the question (page 279):

> "Whatever may be thought of the applicability of this definition down to the last clause, we are satisfied that the 'occupation' of these men was 'necessary to the production' of the clothes. If instead of leasing space in the defendant's building, the manufacturers had each owned and occupied a whole factory of his own ,this conclusion seems to us scarcely debatable."

(In this case, the employer had his own cookhouse employees, and in the above case, Justice Hand says the fact that they would be covered by the Act is "scarcely debatable".) The court further states:

> "Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another. Those who make and keep the factory fit for them in these ways are as 'necessary' to 'production' as they are themselves." (Citing cases.)

The court effectively disposes of the entire argument of point 1 of appellant's counsel; particularly the court disposes of the "parade of horribles" as set out on page 13 of the brief, wherein counsel argues that if the cookhouse employees are necessary for the production of goods for commerce, the farmer who supplied the seed for the eating material would be under the Act. Apparently counsel in the *Fleming Case* made the same type of argument, and went so far as to extend his argument to "the miller who fur-

nishes the flour to a baker who sells bread in other states'' or ''the cutler who sells knives to a wholesale butcher,'' or ''the service station which repairs and fills a manufacturer's trucks,'' or ''the chemist who supplies alcohol to a perfumer.'' Further *reductio ad absurdum* argments were made. Justice Hand disposes of this type of argument (page 280) by saying:

> ''Since the words and the purpose of the act coalesce so far, we will not allow ourselves to be drawn into dialectical niceties which are not before us and whose answer need not compromise the step we are taking.''

In the case of *Warren-Bradshaw Drilling Company v. O. V. Hall, et al, 5 Labor Cases, Paragraph 60,821* (U. S. Circuit Court of Appeals, 5th Circuit), it was held that employees, who were engaged in operating an artery drill for drilling holes for oil which would eventually move in interstate commerce, were engaged in an ''occupation necessary for the production of goods for commerce'' within the Act. The defendant involved in this case was a drilling contractor, and neither the employer nor the employee actually produced any oil or had any interest in oil. However, the court held that even though the actual employer or employee were not actually engaged in the production of goods for commerce, the employee's services were necessary for the production of the oil.

In the *Kirschbaum case,* the *Arsenal case* and the *Warren-Bradshaw case,* the employer, himself, was

not engaged in the production of goods for commerce. In this case, the court does not have to go that far, because it is admitted that 70% of the goods manufactured by the employer were eventually moved in interstate commerce.

We have already seen that watchmen, janitors, firemen, engineers, etc., were all held by Circuit Courts of Appeal and state Supreme Courts to be occupations "necessary for the production of goods for commerce", even though in some of these cases the actual employer of the plaintiff was not himself engaged in interstate commerce. It follows then that an individual who is engaged in seeing that men are fed so that they may continue on the job is just as necessary as a watchman for the production of goods for interstate commerce.

In the case of *Ikola v. Snoqualmie Falls Lumber Company,* 112 Wash. 156, 121 Pac. (2d) 369, the Supreme Court had before it a case similar to the one before this court now, and reversed the case on a procedural ground. However, in the lower court, which decision is reported in 4 Labor Cases (CCH), paragraph 60,615, the lower court definitely held that *the employees of the cookhouse were engaged in an occupation necessary for the production of lumber for interstate commerce and the cookhouses were not service establishments.*

Interpretative Bulletin No. 1, which covers the points of jurisdictional coverage, states as follows:

> "The second category of workers included those engaged in 'the production of goods for (interstate) commerce', applies, typically but not exclusively, to that large group of *employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce* out of the State in which the plant is located. *This is not limited merely to employees who are engaged in actual physical work on the product itself,* because by express definition in section 3(j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof, in any State.*' Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of goods. *Enterprises cannot operate without such employees. If they were not doing work 'necessary to the production' of goods they would not be on the payroll.* Significantly, it is provided in section 15(b) that 'proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within 90 days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods'. Hence, except for the special categories of employees within the exemptions of section 13, *all the employees in a place of employment where goods shipped or sold in interstate commerce were produced, are in-*

cluded in the coverage, unless the employer maintains the burden of establishing, as to particular employees, that their functions are so definitely segregated that they do not contribute to the production of the goods for interstate commerce as these terms are broadly defined in the act.'' (Emphasis ours.) (2 CCH Labor Cas., ¶ 32,101.)

Other cases which have held that watchmen, maintenance men, repair men, clerical workers, telephone operators, messengers, janitors, etc., were "necessary for production of goods for commerce" are *Fleming v. Hawkeye Pearl Button Co.* (C. C. A. 8th, 1940), 113 Fed. (2d) 52; *Bowie v. Gonzalez* (C. C. A. 1st, 1941), 117 Fed. (2d) 11; *Snyder v. Cassales* (S. D. N. Y.), 5 CCH Labor Cas., Par. 60,958; *Pruitt v. Carruthers & Son* (D. Ct. Tenn.), 5 CCH Labor Cas., Par. 60,957; *McMillan v. Wilson* (Minn.), 5 CCH Labor Cas., Par. 60,954; *Robinson v. Larue* (Tenn.), 156 S. W. (2d) 433; *Reeves v. Howard Refining Co.* (N. D. Tex.), 33 F. Supp. 90; *Muldowney v. Seaberg Elevator Co.* (E. D. N. Y.), 39 F. Supp. 275; *Lefevers v. General Export Iron & Metal Co.* (S. D. Tex.), 36 F. Supp. 838; *Johnson v. Phillips Buttorf Co.* (Tenn. Chanc., decided Jan. 2, 1942), CCH, Par. 62,709.

We think that we have conclusively demonstrated that the cookhouse employees, both at Glenwood and Camp 2, were employees so integrally tied up with the business of the employer that these employees are engaged in an occupation necessary for the production of goods for interstate commerce. The court will note out of 302 employees at Glenwood, only about 18

at the most were employed in the cookhouse. There is no distinction between these employees and their necessity for the smooth flow of commerce, as there is between an individual who sharpens an axe, who files a saw, who repairs the donkey engine or the locomotive.

In other words, paraphrasing the court in the *Kirschbaum case,* supra, the services of cooks and dishwashers are necessary in that they are both "convenient and appropriate" to the maintenance of production of logs for commerce.

II

Employees in a logging camp cookhouse at Camp 2 are not exempt from the provisions of Section 7(a) of the Act, because said employees are not engaged in any retail or service establishment, the greater part of whose selling or servicing is in interstate commerce, as provided by Section 13(a)(2) of the Act.

The test as to whether an employee is under the exemption of this Act or not is not to be determined by the status of the employee, but rather by the status of the employer. This was the holding of the Circuit Court, and such a holding is well supported by authority. In other words, the sole question is whether the cookhouse is a retail or service establishment, and this must be determined on an employer basis.

In the first place, Section 23 of Interpretative

Bulletin No. 6, quoted by the appellant, utterly destroys the argument of the appellant. The last sentence of Section 23 states: " * * * further, the service is usually rendered at a retail price." In this case, it was actually agreed that the food was to be produced on a cost basis (Tr. 34 and 76) in an agreement between the union and the employer. This definitely shows two things: (1) that there would be no retail price and no profit made; and (2) and that the purpose of the cookhouse was merely an adjunct and a part of the logging company and not a separate establishment.

In the stipulation of facts, it was agreed (Tr. 30) "that the defendant Consolidated Timber Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan and qualified to do business in the State of Oregon, and that it owns timberlands, and is engaged in the business of logging in Washington and Tillamook counties in the State of Oregon."

In other words, it is admitted in this case that the business of the corporation is logging and not the restaurant business.

Furthermore, we note from the Oregon Lien Law, OCLA, Section 67-1301, that cookhouse employees are definitely included as a part of the logging crew for the purposes of liens. This law is as follows:

"Every person performing labor upon or who

> shall assist in obtaining or securing sawlogs, spars, piles, cordwood, or other timbers, has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. *The cook in a logging, or other camp, and any and all others who may assist in or about a logging, or other camp maintained for obtaining or securing sawlogs, spars, piles, cordwood, or other timber, shall be regarded as a person who assists in obtaining or securing the sawlogs, spars, piles, cordwood, or other timber herein mentioned*". (Emphasis ours.)

We think that the agreement made between the company and the union as to furnishing meals on a cost basis is of particular significance. The reason this was included in the agreement is obvious. It was recognized by the parties that the company was not engaged in the business of operating restaurants, but it was engaged in the business of logging, and there was no purpose in making a profit out of the cookhouse at the camp, but it was to be maintained merely as an integral part of the whole logging operation. As we interpret "service establishment", it would mean a business conducted for profit, such as a filling station or garage. The original purpose of the service and retail establishment exemption is set out in the legislative history of Section 13(a)(2) of the Act, as follows:

In the original bill (HR. 7200, S. 2475), introduced May 24, 1937, there was no express exemption

for retail or service establishments and there was no mention of any limitation in respect to the coverage of such establishments. However, in the first hearing on the bill Robert H. Jackson, in answer to a question about the application of the bill to retailers and the service trades, stated: "It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the pants presser and small business * * *." (House Hearing, page 35.)

At the House debate regarding the exemption for retail business on May 24th, 1938, the author of the amendment stated that it was intended to dispel doubt about the exemption applicable to retailing and that if accepted then "retail dry goods, retail butchering, grocers, retail clothing stores, and department stores will all be exempt." Representative Norton agreed to this amendment and it was passed by the House. After passage, Representative Johnson of Oklahoma remarked that the amendment is intended to "protect the little corner store, filling station and other retailers who purchase a substantial part of their goods across the state line" (83 Cong. Rec. 7437-7438).

In the final conference report the words "or service" and "or servicing" were included. There appears to be no record of any discussion concerning these words.

If there is any further need for argument on this,

we notice that Interpretative Bulletin No. 6, Section 40, quoted by the appellant, sets out typical examples of service establishments, such as restaurants, cafeterias, roadside diners, hotels, etc. This bulletin, set out on pages 30 and 31 of appellant's brief, among other things states:

> "The cookhouses and bunkhouses are not adjuncts which are unrelated to the business of lumber or mining. They are as much a part of the principal business as the tool sheds."

We submit, therefore, that both cookhouses at Glenwood and Camp No. 2 are not retail or service establishments.

Counsel criticizes the fact that these interpretative bulletins have been changed. Actually, as we understand the record (Tr. 36), there was no interpretative bulletin which held that logging camp cookhouses were exempt. There was merely an ex parte letter in correspondence carried on between the National Lumber Manufacturing Association and the Wage and Hour Administration of which the cross-appellant had no knowledge. Note particularly the correspondence between the representative of the employees and the Wage and Hour Administration on this subject (Tr. 37). The weight to be given interpretative bulletins (and we do not mean ex parte letters which have no effect in law of any kind) is accurately stated in *U. S. v. American Trucking Co.,* 310 U. S. 534, 549, 60 S. Ct. 1067, 1069, that such interpretations are entitled to great weight.

The appellate courts have also disposed of this question of retail and service establishments in the case of *Fleming v. Kirschbaum, supra,* (p. 572), where employees such as firemen, engineers, elevator operators, etc., for a building were held to be in an occupation necessary for the production of goods in interstate commerce. The court, in replying to the defendant's contention that these employees, working for the building, were engaged in a service establishment held:

> "We agree with the district court that the defendant's business is not a 'service establishment'. It may be conceded that the defendant's employees render service to the tenants but this service is merely incidental to the business of the defendant which is that of leasing space in its building rather than of selling service. *The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as 'service establishments'.* That term may not be given so broad a meaning since it represents a special exception to the general coverage of the act. *Fleming v. Hawkeye Pearl Button Co.,* 8 Cir., 1940, 113 Fed. (2d) 52." (Emphasis ours.)

The court further states that had Congress intended the term "service establishments" to include all establishments rendering incidental service, it would not have considered it necessary to make specifications in the case of carriers by air, carriers by

railway, trolley or motor bus, and telephone exchanges (Sec. 13(a)(4), (9), (11)).

The court further states:

> "In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the exemption as to retail establishments already contained in subparagraph (2) of Section 13(a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops. In Wood v. Central Sand & Gravel Co., D. C. W. D. Tenn. 1940, 33 F. Supp. 40, 47, the court suggested as illustrations of what Congress meant by service establishments 'barber shops, beauty parlors, shoeshining parlors, clothes pressing clubs, laundries, automobile repair shops.' We think these illustrations apt."

In the case of *Fleming v. Arsenal Bldg. Corporation,* supra, Justice Hand similarly held that elevator operators, etc., working in a building where goods were produced for interstate commerce were not exempt by Section 13(a)(2). The court, after holding that the defendant was not a service establishment, the greater part of whose service is in intrastate commerce, said:

> "Possibly it is not a 'service establishment' at all; perhaps that phrase should be limited to

> those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and 'servicing' does indeed suggest as much. But it is enough for our purpose that, if it is a 'service establishment,' at least its exemption must depend upon the extent to which its servicing is intrastate. * * * The 'servicing' being a part of 'production,' *the test should be what kind of production it is a part of.* * * * It cannot be that if the exemption extends beyond retail 'servicing,' it is the character of the 'servicing' itself that counts, divorced from the 'production' of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the act resulting from the accident of the industrial division of the whole process." (Emphasis ours.)

In other words, Justice Hand has well stated *that inasmuch as the work done was actually part of production of goods for interstate commerce, there cannot be at the same time a service establishment.*

Counsel (p. 48 Appellant's Brief), after quoting part of the above language of the *Arsenal case,* states: "We take this language to mean that if the 'service' (here the serving of foods in logging camps) is part of the production of goods for commerce, then the exemption clause is not applicable. But such an interpretation, as we have pointed out before, successfully reads out of the Act entirely the exemption granted by Section 13(a)(2)."

In other words, counsel and ourselves have agreed on the meaning of the *Arsenal case.* However, the

type of exemption that Section 13(a)(2) is meant to cover is clearly stated in Sections 24 and 30 of Interpretative Bulletin No. 6. We quote Section 24 in full, which counsel for appellant has seen fit to quote only in part (2 CCH Labor Cas., ¶ 32,225):

> "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalp-treatment establishments; masseur establishments; funeral homes; embalming establishments; crematories; establishments engaged in cleaning, dyeing, pressing, altering, and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoeshine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

We also quote section 30, which provides:

> "In a broad sense every business performs service, yet no one would seriously urge that all types of businesses were eligible for exemption under section 13(a)(2). It would be surprising indeed, if Congress had intended by the one word 'service,' as used in the phrase 'retail or service

> establishment,' to grant an exemption broad enough to include all of the above-mentioned classes of business, and there is nothing in the legislative history of section 13(a)(2) to support such a conclusion."

In other words, Section 24 indicates a true service establishment and Section 30 reminds us that the type of argument in which counsel has engaged would make everything a service establishment. Obviously Section 13(a)(2) would apply to a situation, such as a person engaged in a pressing shop in Portland, Oregon, who might deliver a small part of his products to Vancouver, Washington. He would be engaged in interstate commerce, but at the same time it would be a service establishment, the greater part of whose servicing is in intrastate commerce.

The case of *Stucker v. Roselle* (W. D. Ky.), 37 F. Supp. 864, is a good illustration of almost exactly the situation we have quoted above. In that case there was involved a company that cleaned and blocked hats for individuals, also by mail order within and without the state. It was held in that case that the employees were engaged in commerce under Section 7 of the Act. However, it was ruled that the employment was exempt because of the fact that this employer was conducting a "service establishment", within the meaning of Section 13(a)(2), and that the greater part of this employer's business was in intrastate commerce. This is the type of situation that Section 13(a)(2) sought to exempt.

In the *Warren-Bradshaw Drilling Company case,* supra, it was held that the oil well contractor was not a service establishment. In all the cases cited above the employer, himself, was not engaged in the production of goods for interstate commerce and the employment under consideration was the only employment engaged in by the plaintiff . In the case at bar, the answer is simpler.

Counsel (p. 24, Appellant's Brief) sets out some rather interesting cases giving the definition of "establishment". The case of *Lilley v. Eberhardt,* 37 S. W. (2d) 599, is not in point, nor is *McNabb v. Clear Springs Water Co.,* 239 Pa. 502, 87 Atl. 55.

The case of *Veazey Drug Co. v. Bruza,* 169 Okla. 418, 37 P. (2d) 294, cited by appellant, is directly opposite to the position taken by the appellant in this case. In that case the Industrial Accident Commission of the State of Oklahoma had held that retail businesses were not within the meaning of the Industrial Accident Act. In this case, the drug company had a large number of retail stores and also had a warehouse in connection with the same. It was contended by the plaintiff that the drug company was operating a "transfer and storage business." The court held that the business engaged in was a "retail drug business," and that pending the selling thereof, the company stored its merchandise in this warehouse. The court definitely held that inasmuch as the store was engaged in a retail business it could not also

be engaged in a transfer and storage business or in a wholesale mercantile establishment. It therefore held that inasmuch as the main business of an employer was a retail establishment, he could not at the same time be engaged in a wholesale establishment and declined to hold that they were separate establishments.

Similarly in this case, the appellant cannot be engaged in a retail or service establishment, when the main business of the employer is that of logging, the cookhouse being merely an incident to the main general business of the employer. It may be true that there are some large companies who are engaged in several kinds of business. (The writer recalls one at the present time prominently in the news, which has engaged in building dams, building ships, manufacturing cement, running steel mills, etc.) In such a case, it is quite true that such a corporation would be engaged in different types of business. But, in the case before us, such is not true. The cookhouse is an integral part of the logging operation and is merely an incident of the main operation, the same as a blacksmith shop, etc.

The case cited of *Rivera v. Central Aguirre Sugar Co.* (D. C., Puerto Rico, 1941), 4 CCH Labor Cases, par. 60,526, of course, is substantially different from the case at bar. In that case there was the situation of a large sugar company who maintained a hotel, a golf course and a swimming pool, contrary to the

statements of fact made by counsel (page 46 of brief). There was no evidence that any of the plaintiffs lived at the Aguirre Club, used the golf course or the swimming pool. Apparently they only worked there. There is a statement, however, that some of them did live at the hotel. In any event, this is an entirely different situation. This is a situation of a company who is engaged in different commercial enterprises, and it would be far fetched imagination to say that a golf club or swimming pool or a hotel of the kind described in this case would be necessary for the production of sugar. These were apparently separate enterprises of the company, which were used for profit and not for the purpose of producing sugar. Incidentally, this particular company also had a retail store. In this case the court seemed to be of the opinion that the warehouse was so tied up with the retail store that they were not engaged in the production of goods for commerce. In other words, this case in many respects is absolutely contrary to the proposition for which appellant cites the case. In other words, *the court found in this case that a warehouse was so tied up with the store that it was a part of the retail store.* Conversely, in the case at bar the cookhouse is so tied up with the production of goods for commerce that it would not be exempt as a service establishment.

The case of *Labates v. Interstate Co.,* 4 Wage and Hour Reporter 91, 3 CCH Labor Cases, par. 6,031, has an entirely different set of facts. The facts in that

action show that there was a large corporation with a greater number of individual or privately owned restaurants located all over the country in railroad stations and also in department stores in metropolitan areas. These restaurants were independently owned and were concessions with admittedly no vestige of integral or functional relation to the operation of the railroad or the department store. These restaurants admittedly were used only for the convenience of the general public who might happen to use them and not in any way to minister to the wants of either department store employees or train crews. These restaurants were operated as substantive enterprises for profit for a clientele as available to it in other sources of similar services, which comprised casual rather than systematic users of its facilities.

As we have previously quoted, the case of *Ikola v. Snoqualmie Falls Lumber Company,* supra, held that cookhouse employees were not engaged in a service establishment. Other cases holding that watchmen, elevator operators, janitors, telephone operators, firemen and engineers were not engaged in working in a retail or service establishment are cited previously under part I of this brief, page ..... These previously cited decisions, which held that the above category of employees were engaged in an occupation "necessary for the production of goods for commerce", also held that these employees were *not* engaged in a retail or service establishment.

In the case of *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40, 46, the court considered Section 13(a)(2) at length in regard to the situation of a night watchman, and concluded as follows:

> "It, therefore, follows that the defense based upon the exemption provided in section 13(a)(2) is sound *only if it appears that the real defendant is a 'retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.' By no stretch of the imagination could either the Fischer Lime & Gravel Company or its trade-name branch, Central Sand & Gravel Company, be called properly a 'service establishment'.* The defendants do not operate barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like. In its interpretative bulletin No. 6, issued December 7, 1938, the Wage and Hour Division of the Department of Labor has defined a 'retail establishment' as one which 'sells merchandise to the ultimate consumer for direct consumption, and not for purposes of re-sale in any form'.
>
> *"This definition does not appear to be sufficiently comprehensive.* Indeed, the Department of Labor itself seems to recognize that it is not; for in its Release No. R-116, December 7, 1938, this statement appears: 'A retail establishment generally sells its merchandise in small quantities and at *prices higher than the price involved in sales to wholesalers or jobbers.* Thus, for example, it would seem that a coal company engaged in selling *large* orders of coal *at a discount from the regular retail price* would not be a retail establishment under Section 13(a)(2), notwithstanding the fact that the coal is purchased for direct consumption and not for purposes of resale in any form.'

> "It is hard to conceive that the defendant in the instant case can be regarded as a 'retail establishment.' " (Emphasis ours.)

In this last example of a coal company selling large orders at wholesale prices for ultimate direct consumption not being a retail establishment, cross-appellant submits that the court has stated a compelling analogy to our case. The cookhouse is of course a restaurant in the elementary sense, in that it is a place where food was sold to the consumer. But in analogy to the coal company selling to consumers at *wholesale* prices in *industrial* quantities, the particular cookhouses here involved sell at *wholesale* prices, to a *fixed clientele* which has *no alternative market* with which the cookhouse is in competition, and which makes this quantity price to the special class of consumers *without profit to itself,* as a necessary adjunct to the major activity of its owners, for the special purpose of maintaining intact the labor supply of the company—*and only secondarily of delivering service for its own sake.*

The case also emphasizes the important factor that the institution dispensing the service must be an "establishment", and that for all practical purposes and in most instances the appellant will be the party who must be examined as to whether he or it is an establishment dispensing service. Now, of course, the Consolidated Timber Company in its capacity as a producer of logs is not a service establishment. To

accord with the contentions of the appellant, the court would have to find that the appellant company exists in two capacities, each being separate and distinct from the other in organization, physical location, function, and *ultimate purpose,* and that one of these capacities, the one in which cross-appellant is employed, is that of a service establishment. To cross-appellant, any contention that the cookhouse function of the Consolidated Timber Company complies with such requirements is absurd. In a most literal sense, the *service* of supplying food for the men is as much an operation in the *production* line as is that of supplying fuel for the donkey, or as is that of payroll clerk, timekeeper, toolhouse clerk, or any of the score of other positions of supply, maintenance, and of a custodial nature which are indispensable to production of logs for interstate shipment. In an equally literal sense, and not at all by way of metaphor, the job of stoking the men satisfactorily for the next day's work is as closely related to smooth and amicable employment relations and steady production of such goods as is that of stoking the furnaces and watering the boilers by the night watchman in the cases cited, who have been uniformly held to be covered by the Act. And this is so, it should be kept in mind, precisely because the operation is *not* analogous to that of a union depot cafeteria, or a lunch room in a city factory, or even a cookhouse adjacent to a lumber mill in an urban district.

One or two examples will clarify further the contentions of the cross-appellant: If this Act were one applying to seamen, which it is not for the reason that other federal legislation covers them, could it be argued with any plausibility that the *ship's cook* operated a service establishment? On an *Antarctic expedition,* the cooking facilities and activities are an integral part of the principal establishment. The mess department of *every army* unit is similarly vital, and it may justly be said that a logging operation works, just as surely as an army travels, on its stomach. Would a *dining car* on a transcontinental train be a "service establishment", or would a *cook and bunkhouse on a ranch* be refused coverage if the Act purported to apply to it? A logging operation miles from the nearest hamlet (Camp 2 was 17 miles from Glenwood, which has a postoffice and store, and 6 miles from the village of Timber) is more closely akin to the above illustrations than it is to a city depot cafeteria or a hotel barber shop or laundry.

The very fact that the test of intrastate business is the proportion of *sales* or items of service indicates that Congress contemplated a variety and spread of business, and was thinking of concerns or establishments with customers or clients from more than a single plant, operation or factory, and especially of situations in which no alternative to patronizing such establishment presents itself. We consider that the distinction was intended to be established between

service *establishments,* in the sense of independent and separate industries, and those activities which are vital adjuncts of a single factory or operation. These latter are service *activities* because they *serve* the primary operation, but cannot properly be called service establishments within the meaning of the Act because they do not respond to the distinction between *production industries* and *service industries.* In short, the proper line of differentiation is that of the economists—the contrast of those distinct enterprises which *produce goods,* whether capital or consumers', and those equally separate and distinct enterprises which *deliver services.* A production establishment may and in most instances does include phases which, considered separately and unrealistically, constitute service activities. But, as a going concern, in the sense in which the protection of interstate commerce is relevant, such incidental service activities within or integrally related to a production establishment are *parts of it* for all the purposes of the Act with no independent or substantive existence in their own right. And with respect to this case, we think that there is little question that there is no *substantive* service character in logging camp cookhouses.

In sum, we contend that by the very fact that the cookhouse is an indispensable part of the logging operation, its employees are engaged in an activity, process or occupation, necessary to the production of goods for commerce, and it cannot be considered

a service establishment. In the various bulletins and rulings, the commentators list, as illustrations of the establishments which are certainly of a service character, the following: Hotels, restaurants, laundries, garages, barber and beauty shops, funeral homes, supply stores, drug stores, groceries. None of these presents a compelling analogy to the situation of a logging camp cookhouse, located many miles from settled districts, and furnishing the only source of meals for the employees of defendant, and by and large for them only. Bulletin No. 1 lists stenographers, messengers, watchmen, clerks and maintenance workers as employees engaged in producing goods for commerce for the reason that "enterprises cannot operate without such employees." This is at least equally true of cross-appellant and his assignors in the present case. And the evidence further shows that from the standpoint of the purposes of the Act and of the interests of the appellant, the service rendered and the goods sold are clearly "for industrial or business purposes", under the requirement of Bulletin No. 6, Sub. 8 and 11, quite as literally as is the coal sold to a factory by a fuel supply company, and without the added factor of separate management, control and profit-taking. Regarding this test of "industrial or business" purpose, the following is significant:

> "The term 'retail sales' means 'sales to *individual consumers'*, the inspectors have been instructed. 'A sale for industrial or business purposes as distinguished from private consumption,

is not a retail sale', the inspectors have been advised." (CCH Service, FLSA, 33-273.)

"You also suggest that laundries should be considered 'service establishments' within the meaning of Section 13 (a)(2) of the Act, which exempts any employees engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. We are enclosing Interpretative Bulletin No. 6 which discusses the exemption, and your attention is particularly directed to paragraphs 10 through 15 of this bulletin. You will note that laundries which perform laundry work for private individuals are ordinarily considered to be 'service establishments' within the meaning of the exemption. *However, as suggested in paragraphs 7, 8 and 11 of that bulletin, laundries performing work for industrial establishments would not be considered service establishments* * * *." (Emphasis ours.)

Paragraph 22 of Bulletin No. 6, in speaking of retail establishments, announces that the Administrator will include them in the classification of a dominant wholesale concern *"if the entire enterprise is consolidated and operated as a distinct or integrated business unit."* Such is the present case.

Further, even the dictionary meaning corresponds to our contentions. One of the definitions for the word "service"—the only one which is at all related—reads:

"Service: Any result of useful labor which does not produce a tangible commodity. In economics, such *business concerns* as railroads, telephone companies, or laundries, and such persons as physicians, are regarded as performing serv-

ices.''—Webster's New International Dictionary. (Emphasis ours.)

Our cooking activity is certainly not a *concern,* or an *enterprise,* because it is not independently owned, it is operated at cost, and it is intended to serve the major objects of the logging operations.

It is of no argument here to state that the cookhouses were entirely separate buildings. The logging companies do not operate as factories, which have all operations under one roof. Logging operations are scattered over miles of territory. Under the interpretation asked for by the appellant, because the cookhouse was in a separate building, the blacksmith shops and the repair shops similarly would not be under the Act. We do not believe that even the appellant would contend this.

Again, we call to the court's attention the collective bargaining agreement which provided for a cost basis. We can be certain that if this was a separate service establishment, the company would not be operating a cookhouse for the amusement it received from such an enterprise. *Actually, the cookhouse was operated because it was an integral part of the logging operation and it was not a service establishment of any kind.*

The law is clear that the exemptions must be strictly construed and the burden of proof is upon the employer to remove itself from such exemption. There

is no evidence in this case that the cookhouse at Glenwood or at Camp 2 advertised to the general public for customers. In fact, the record shows that the few strangers who did eat at Glenwood were charged extra for their meals. It could well be argued that this was not a retail or service establishment because the food was carried at a cost basis, and courts have held and interpretative bulletins have stated that where production is on a wholesale basis, it is not a retail establishment at all (see particularly *Pruitt v. Caruthers & Son, supra,* wherein a retail establishment which sold part of its goods retail and part wholesale and most of them in intrastate commerce was held not a retail or service establishment because part of the goods were sold at wholesale rates. See also *Wood v. Central Sand & Gravel Co.,* supra.)

III

Employees of the cookhouse at Glenwood were not exempt under the provisions of Section 13(a)(2) of the Fair Labor Standards Act.

As we have previously indicated, this is the opening argument of the cross-appellant. Most of the arguments that would be advanced under this heading have already been covered in point I, and particularly point II, of our brief. We, therefore, are not going to belabor the court with repetitious arguments, but merely refer the court back to the previous parts of our brief.

We believe that the court below was definitely in error when it excluded the Glenwood camp on the ground that it was a service establishment. As we have pointed out, there were but few of the general public that ever stopped at the place, and we can assume that many of those were people who went to the company on business. It is also to be noted that a higher rate was charged any stranger that might happen to eat there. Particularly, the court below was in error in citing as one of its reasons for its decision that the Glenwood camp is a service establishment. The court states: "The employees in the woods and union stipulated it should be operated at cost and should be self-sustaining" (Tr. 65). This clause in the collective bargaining agreement clearly pointed out that this was *not* a retail or service establishment, to be operated at profit, but was a necessity, otherwise the employer would never have agreed to operate these cookhouses at cost.

There would have been just as much effect on interstate commerce if the cookhouse at Glenwood had to shut down; also it was just as much an adjunct of the logging business of the company as was the camp at Camp 2.

The court below was particularly in error in its statements in its criticism of paragraph 40. The court overlooks realities. There is a wide difference between a cookhouse in a logging company, which is a necessary part of the conduct of the main enterprise of the

company, logging, and the Circuit Court's general view that the company should be encouraged to operate "service establishments such as gasoline filling stations, swimming pools and beauty parlors" (Tr. 69). Such enterprises as these, although they may be admirable, have nothing to do with the getting out of logs.

On the other hand, food is an absolute essential, without which men cannot work. We believe loggers can struggle along somehow without the benefit of filling stations, swimming pools or beauty parlors. However, a logger would have a very difficult time working without food. We believe the type of statement made by the lower court is merely engaging in dialectics, such as suggested by Mr. Justice Learned Hand in *Fleming v. Arsenal Bldg. Corp.,* supra. It is true that a timber worker is a member of the general public, but at the same time he is an employee of the appellant, and it is necessary for him to eat at either the Glenwood Camp or, as the logging was moved back farther, at Camp 2, in order for the company to successfully operate.

Counsel on page 49 of his brief has seen fit to argue completely off the record and to make the statement, "and in the collective bargaining agreement made between the employers and the unions which represent them, cookhouse employees were excluded from the limitations of hours worked. Both the employers and unions have therefore explicitly recognized, first,

that the cookhouse operation is essentially a service operation and, second, that cookhouse employees are in a class apart from others employees." So that the record may be straight on this subject, appellant made such a contention that there was an agreement between the employers and the union that these men were to be worked as many hours a month as was necessary without overtime pay (see Tr. 49). However, the lower court stated in its opinion (Tr. 71):

> "The primary plan (this was the plan offered on the basis that there was no limitation of hours) offered by the defendant cannot be accepted because the court cannot find from the evidence that the contract between the defendant and those employees contains the terms which are inherent in the basis for this plan."

The collective bargaining agreement covered the cookhouse employees in all the essentials of a collective bargaining agreement, the same as it did the cutting crew, rigging crew, shop crew, track crew, etc. We cannot see, therefore, that it follows that "Both the employers and unions have therefore explicitly recognized, first, that the cookhouse operation is essentially a service operation, and, second, that cookhouse employees are apart from other employees." There is nothing in the record, either in the lower court or in this court, to justify such conclusion.

CONCLUSION

We believe that we have effectively demonstrated that employees working at the cookhouses at Camp 2

and Glenwood were employees whose occupation was necessary to the production of goods for commerce. Certainly their occupation was "convenient and appropriate" to the production of goods for commerce.

We also believe that we have demonstrated that the cookhouses at Camp 2 and at Glenwood were not service establishments, because as pointed out in *Fleming v. Arsenal Bldg. Corporation,* supra, inasmuch as servicing is a part of the production, there can be no service establishment.

We respectfully, therefore, ask the court to rule:

(1) That the cookhouse employees working at Camp 2 and at Glenwood were engaged in the "production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938; and,

(2) That the cookhouses at Camp 2 and Glenwood are not exempt under Section 13(a)(2) of the Act, and that the said employees were not engaged "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

Respectfully submitted,

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